No. 11567

In the United States
CIRCUIT COURT OF APPEALS
for the Ninth Circuit

SHEVLIN-HIXON COMPANY, a corporation,

Appellant,

vs.

GALINA M. SMITH,

Appellee.

ANSWER BRIEF OF APPELLEE

Appeal from the District Court of the United States for the District of Oregon.

HON. CLAUDE McCULLOCH, *Judge.*

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STEVENS-NESS LAW PUB. CO., PORTLAND

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STATEMENT OF THE CASE

This is the second time this case has been before this court on appeal.

The plaintiff-appellee Galina M. Smith, appealed the first time from an order of the trial judge directing a verdict against her, and this court reversed the lower court and sent this case back for a new trial. (See *Smith v. Shevlin-Hixon Company, a corporation,* 157 F. (2d) 51.)

Upon the second trial, the evidence was substantially the same as in the first trial, and the jury awarded Mrs. Smith, the plaintiff, a verdict of $5,900.00 damages against the defendant-appellant for injuries to her right knee that she received while she was employed by appellant in its box factory, one of its re-manufacturing divisions of its sawmill located at Bend, Oregon, and while engaged in work involving risk and danger to herself under and by virtue of the Employers' Liability Law of the State of Oregon. Thereupon the defendant-appellant appealed from the judgment entered upon such verdict of the jury. When we refer to the Transcript of Record, we will use the letter T.

Galina Smith was employed as an off-bearer or grader of material coming from the hi-cut-off saws in appellant's box factory at Bend, Ore., and worked at a 3-sided bench or table about waist high. The material so graded was removed by live rolls placed tightly against the said work benches and in such a manner as to make a fourth side or a complete enclosure of the working position of Mrs. Smith. The area within which the said Galina Smith worked was approximately 3 feet square, and proof showed the hi-cut-off saw from which all material came was about head high from the floor, or, stated in another way, a little more than 2 feet above the work bench itself, so that the injured person was working within slightly more than arm's length of the fast-moving power-driven saw from which the box shook was constantly dropping, and which Mrs. Smith was required to quickly grade and stack and place upon the power-driven rolls which made up the fourth side

of the pit. At the time of the accident the appellee was working at night and was required to move quickly from one position, as above described, to others of the long series of pits below similar types of hi-cut-off saws, for the reason that the night shift employed a lesser number of workmen so that during the night hours no new lumber was brought to the various hi-cut-off saws, and that as the material at one cut-off saw was worked up the sawyer would move to another saw and Mrs. Smith was required to climb out of the pit and go to the new working position.

The change of working position was accomplished by a number of methods. The proof here showed that Mrs. Smith used the less dangerous of all methods and the one which she was directed to use by her particular foreman. This was accomplished by climbing up on the waist-high, 3-sided work bench, which was covered by a steel plate, then to step over a part of the hi-cut-off saw upon a walkway, or cat-walk, suspended from the ceiling of the box factory, and which walkway was slightly higher than the hi-cut-off saws themselves, and to move upon this catwalk to where her sawyer had gone, and then reverse the process, stepping down a short stairway from the catwalk to the area of the hi-cut-off saw upon the steel-covered work bench or table top and then jump into the pit, a distance of a little less than 3 feet, and to be in position to resume her work as the sawyer began his work of cutting up the lumber at that particular saw, which change she had to make quickly in order to be in position when the sawyer started sawing on the new operation.

Evidence was conclusive that it was wholly unnecessary for the power-driven rolls to be waist-high and in such a position as to entirely enclose the working position of the off-bearer, as immediately after the filing of this damage action the defendant company reconstructed its box factory (T. 77, 113, 114 and 115) so that the rolls are under the 3-sided table or work bench and all the employees engaged in work of the type being done by Galina Smith go to and from their work positions without the use of any catwalk, without the requirement of climbing over any hi-cut-off saws, without the necessity for jumping from any table (T. 6) whatsoever, but remaining at all times on the floor level of the box factory itself and then walk into their working positions; and it was admitted by the appellant during the trial that the said change had in no wise impaired the efficiency of the operation itself, in fact it was claimed by the company that the change was made to speed up the work and not as a safety measure (T. 134, 168).

There was ample testimony to show appellee was an inexperienced employee on this particular operation and that she had only been working on the saw approximately two weeks before she was injured (T. 185). The testimony also showed that she was instructed by the foreman of the company to jump into this pit as a means of carrying out her employment, even after she complained about jumping, and that she was an inexperienced worker with reference to such particular employment (T. 187). She was injured on May 15, 1943, while so jumping into such pit and into her working

position (T. 189, 190, 193, 198, 26, 27, 28, 29, 33, 44).

The hi-cut-off saw was located approximately two feet above the table where appellee worked, on the end opposite the moving rolls. Here the sawyer took lumber from a bin behind him and sawed it into short lengths, which he slid down to the table where appellee was working. The appellee then sorted the cut lumber and after stacking it, placed it on the moving rolls, which carried it away. She was always required to work near power-driven, fast-moving saws, and upon every occasion when she entered her working position or left her working position she had to step over a part of the said hi-cut-off saw. So we specifically call the Court's attention to the fact that, in addition to the foregoing, it must be borne in mind that the plaintiff-appellee was required to work in its box factory, part of the sawmill itself, and that the entire operation comes within the definition contained in Section 102-1725, O.C.L.A. 1940, and thus is a hazardous occupation.

On May 15, 1943, appellee, at the direction of Guy Smith, foreman, was taken to the Lumberman's Hospital at Bend, Oregon, with an injured knee. Most of the foregoing facts were stipulated in the pre-trial proceedings, see T. pp. 2, 3, 4 and 5.

The pre-trial order also provided that "this is an action brought under and by virtue of the Employers' Liability Act of the State of Oregon (Sec. 102-1601, O.C.L.A. 1940) which requires, *among other things,* 'all owners, contractors or sub-contractors or other persons having charge of, or responsible for, any work involving

risk or danger to employees or the public, to use every device, care and precaution which is practicable to use for the protection of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine or other apparatus or device, and without regard to the additional cost of suitable material or safety appliances and devices.' "

It is refreshing to note that in the former appeal the following was before the Court, for as this Court says in its opinion:

> "The appellant contended that the only means of entrance into her place of employment was to come down a cat-walk, crawl over a rail to the table, and then jump from it to the floor or crawl over the rolls. The appellee maintained that she could have walked to her station on the floor level or entered either under or over the rolls, or could have descended safely without jumping.
>
> "The appellant asserted that a ladder, stairway, or a redesigning of the operational set-up could have been used without impairing the efficiency of the structure, and that thus there would have been provided a safe means of entrance, without requiring her to jump down thirty-three to thirty-six inches. The appellee denied this, insisted that there was a safe means of entry which she could have used, but admitted that on or about April 17, 1944, the rolls were removed from the rear of the enclosure in which the appellant had been required to work, and a moving belt placed under the front table, leaving open the rear of the enclosure.
>
> "The appellant alleged that on May 15, 1943, when she jumped from the table top to the floor to begin work behind the No. 4 cut-off saw, she suffered a fractured bone and semilunar cartilage and 'other damage thereto', of her right knee, to-

gether with torn and wrenched ligaments of the said knee. Appellee denied that the appellant jumped, and contended that she was not injured at all on May 15, 1943, and that if she did jump, it was her own negligence.

"The appellant asserted that because she was employed in a box factory 'or sawmill', was required to be near and about power-driven machinery, and for other reasons, the work that she performed was one involving risk and danger to the employees and to the public, and particularly to herself, within the meaning of the Employers' Liability Act of Oregon. The appellee denied that any risk or danger referred to in, or within the interpretation of that statute caused, or in any way contributed to, the alleged injuries."

All of the foregoing is exactly the same as the case at bar and the verdict of the jury shows that they believed the contention made by the appellant in the former appeal and did not believe the contention of the appellee in the former appeal of this case.

These issues are referred to in the pre-trial order and are set out on Pages 5, 6, 7 and 8 of the Transcript of Record herein.

As appellant company says on Page 5 of its opening brief:

"Plaintiff contended that as a result of her descent from the table to the floor that 'she suffered a fractured bone and semilunar cartilage and other damage thereto, the exact nature and extent of which is unknown to the plaintiff, of her right knee, together with torn and wrenched ligaments of said knee'."

The evidence substantiated appellee's contention and includes traumatic arthritis and the so-called knee mouse which appellant now contends in its brief are not involved in this case (T. 26, 27, 28, 29, 33, 42, 43, 44, 55, 56, 189, 190, 193, 84, 86, 89, 107 and 198).

The appellee now contends and maintains that this second appeal in this case, under the circumstances as shown by the record in this court, does delay the proceedings on and to collect the judgment of the lower court, and appear to have been sued out merely for delay, and therefore appellee is now entitled to damages of 10% of the judgment in addition to the interest, in addition to the regular judgment, by reason of this present appeal, under sub. 2 of Rule 26 of this Court.

ANSWERING APPELLANT'S SPECIFICATIONS OF ERROR 1, 2 and 4

as shown on Pages 11 to 28 of its opening brief herein.

Appellant states on Page 13 of its brief that "appellee based her right to recover under the Employers' Liability Act on the contention that the general work in which defendant was engaged was inherently dangerous. This contention was based on the erroneous belief that where the general occupation of an injured employee is one involving risk and danger, *that an injury sustained while he is performing an act which is not inherently dangerous would be subject to the Act.*"

Then counsel cites a case decided in November, 1932 by the Oregon Supreme Court as authority for

this proposition, and also claims this same case (*Fitzgerald v. The Oregon-Washington R. and Nav. Co.,* 141 Or. 1, 16 P. (2d) 27) was also relied upon by this court upon the first appeal in the case at bar.

Counsel then goes on to refer to and quote extensively from the case of *Barker v. Portland Traction Co.,* 43 Or. Ad. Sheets 49, as authority for the proposition that an injured employee in order to be within the Employers' Liability Act must be performing work which is inherently dangerous at the time he sustains his injury, and *that if such employee, even though his general work involves risk and danger, if such employee sustains an injury while performing an act which is not inherently dangerous, he is not entitled to the benefits of the Employers' Liability Act.*

Counsel then states on Page 18 of his brief, *that the act was never intended to cover a mere voluntary bodily movement by the employee, especially when the manner of the movement is controlled by the employee,* and relies principally upon the case of *O'Neill v. Odd Fellows Home,* 89 Or. 382, 174 Pac. 148, and also upon the case of *Ferretti v. Southern Pacific Co.,* 154 Or. 97, 57 P. (2d) 1280, and other cases easily distinguished on the facts.

The trouble with appellant's reasoning is that it is not applicable to the facts in the case at bar as shown by the evidence and the record.

In the *Barker* case the injured workman had abandoned his duties which involved risk and danger and voluntarily assumed other work which was not inher-

ently dangerous.

The court says, 43 Or. Ad. Sheets, Page 71:

> "The plaintiff was injured while removing snow from a small area of the public street, and as we have indicated work of that kind is not inherently dangerous."

The court then goes on to say on Page 71 of its opinion:

> "According to our interpretation of the act, its protection is available only to (1) employments which are attended with inherent risks and dangers, and (2) employments which are rendered hazardous through the use of machinery, scaffolding, dangerous substances, electrical devices or other equipment and substances which are expressly enumerated in the act. Any other construction of the act would not only import into it a provision which is not there, but would grant to a streetcar operator, who occasionally cleans a switch, the protective features of the act, and withhold them from the switchmen and greasers who daily work about the switches. . . . It follows from what we have said that the plaintiff's work of removing snow from the switch was not within the protection of the Employers' Liability Act."

Moreover, the *Barker* case quotes with approval the Fitzgerald case, at 44 Or. Ad. Sheets, Pages 68, 69 and 70, and says, at Pages 69 and 70, relative to the Fitzgerald case:

> "The statute expressly mentions 'Any defect in the structure materials, works, plant or machinery of which the employer or his agent could have had knowledge by the exercise of ordinary care, the neglect of any person engaged as superintendent, manager, foreman, or other person in charge or

control of the works, plant, machinery, or appliances; . . .'

"The word 'works', as used in the statute, means an entire plant—all the real estate, buildings and machinery used in the particular business . . .

"Therefore, the jury would have been warranted in finding *that the unlighted condition of the stairway resulted from the neglect of the superintendent, manager, foreman, or other person, in charge of the works.* . . .

"It will be seen that the decision was not concerned with the 'and generally' clause. *The attacked judgment was sustained on the ground that, through the defendant's failure to comply with requirements of the lighting statute, the defendant's 'works', in which the plaintiff was required to perform his duties were rendered unsafe, in violation of the Employers' Liability Act.*" (Italics added)

In the case at bar, the jury can say, and no doubt found that plaintiff-appellee was injured as the result of the neglect of her foreman in ordering her to jump into the pit to the place where her work station was, and also due to the neglect of the company to take away the moving rolls sooner so that appellee could have reached her work station by walking into it on floor level. She had an unsafe place to work, and the duties of her work were also unsafe.

Taking this view of the situation, it will also be noted that in the case at bar appellant's "works" in which the plaintiff was required to perform her duties was rendered unsafe. Thus it may be clearly seen that this action is not based solely upon the "and generally" clause to which appellant refers, as shown by Sec. 102-1605, O.C.L.A.

The statute referred to in the opinion in the *Fitzgerald* case is Section 102-1605, O.C.L.A., which the court quotes at length, which statute is another part of the Employers' Liability Act of Oregon, and which also applied to the case at bar.

It is very clear that under the facts in the case at bar, Mrs. Smith had an unsafe place to work, her duties were unsafe and she was engaged in work every day that was inherently dangerous because it involved risk and danger by reason of the fact that the power-driven machinery consisting of the moving rolls were on one side of her working pit or trap, and near her, and the hi-cut-off power saw was within arm's length, and she did not move into this pit or trap by a mere voluntary bodily movement, *but jumped down in, in response to orders and commands from her foreman,* from a level that was waist high, *and the jury determined that the getting in and out of the pit was in and of itself a hazardous act and a part of her work and duties* (T. 63, 72, 73, 75, 76, 77, 119, 121, 163, 166, 169, 186, 187, 189, 201, 202 and 251). The court specifically instructed the jury that they must decide whether that way of getting to her work involved inherent danger (T. 251).

The *O'Neill* case that counsel cites is not even remotely similar to the facts here and was an action brought by a laundress employee of an Old People's Home who was injured in falling off a stepladder while hanging out some washing on a clothesline on the porch. The court held such an employment was not inherently dangerous and did not come within the Employers' Liability Law. But in discussing the application of the act,

the *O'Neill* case cites the case of *Olds v. Olds,* 88 Or. 209, 171 Pac. 1046, which supports appellee's contention and is authority for the proposition that plaintiff-appellee in the case at bar was engaged in work involving risk and danger at the time she was injured when she jumped down into the pit or trap where she worked. The *Olds* case, at 88 Or. 215, refers to Gen. Laws Oregon 1913, Chapter 12, Section 13, which is now Section 102-1725, O.C.L.A. subdivision (a), and which provides that if an employer is engaged in any of the occupations defined by such act as hazardous, the workmen employed by him in such occupation are deemed to be employed in a hazardous occupation but not otherwise. The hazardous occupations to which this act is applicable includes:

> "(a) When power-driven machinery is used, the operation of . . . . factories, mills or workshops."

The court then holds that such a definition relates to a "work involving a risk or danger to the employees" and is applicable to the Employers' Liability Act of Oregon.

Then the case of *Eckhardt v. Jones' Market,* 105 Or. 204, 209 Pac. 470, involved a case where defendant was operating a factory where power-driven machinery was used and manual labor was exercised by the employees, and the court at 105 Or. Page 210, quotes with approval a definition of factories as "undertaking in which the business of working at commodities is carried on with power-driven machinery, either in manufacture, repair or change, and shall include the premises, yard and

plant of the concern." The court held that as a matter of law the defendant was under the Employers' Liability Act and engaged in a hazardous occupation, *"and the fact that plaintiff was not actually engaged in the operation of power-driven machinery when the injury occurred will not of itself relieve defendant from liability, provided the other elements of recovery are present."* (105 Or. Page 211) (Italics added).

Then in the case of *Hardenbrook v. State Industrial Accident Commission,* 148 Or. 661, at Page 664, 38 P. (2d) 696, the court affirms the aforesaid definition of a factory and holds that such a place using power-driven machinery is a hazardous occupation, and say that the vital question involved is, "Was the plaintiff at the time of his injury carrying on work for an employer engaged in a hazardous business as defined by statute?" Then the court went on to decide that when power-driven machinery was used and plaintiff's injury arose out of and in the course of his employment, then he was injured while engaged in a hazardous occupation.

We might also suggest that this court in its opinion in this case on the first appeal distinguishes the Ferretti case cited by appellant, *and also said that the jury could have found that the proximate cause of the accident to appellee herein was appellant's negligence in requiring appellee to work in a place to which the only ingress was by means of a thirty-three inch jump or because the foreman instructed her to jump.*

This court also noted that appellee at the time of the accident was an inexperienced employee, and hurried

to her work just as the other girls did and tried to do as they did as well as she could, *and she also did what her foreman told her about jumping down into the pit off the steel covered table.* The record here shows the same facts.

ANSWERING APPELLANT'S SPECIFICATION OF ERROR NUMBER 3

as shown on Pages 28 to 32 of its opening brief herein.

Appellant states on Page 28 of its brief that "the trial court erred in failing to instruct the jury properly as to the law in regard to the Employers' Liability Act with reference to the facts which the jury must find in order for said act to apply."

Appellant complains that the court did not instruct the jury as to what constitutes negligence nor the rule as to the preponderance of the evidence, and that such negligence was the proximate or contributing cause of the accident.

The trial court covered these points in his instructions to the jury as is shown by the Transcript of Record herein at Pages 250, 251, 252, 253, 254 and 255.

Moreover, appellant does not set out the part referred to, and in case appellant happened to request any specific instructions it now complains about, appellant did not take any exceptions to the failure to give such requested instructions, or set out any grounds of objection urged at the trial, and so the points involved are waived under Rule 20, subdivision "D" of the Rules of

this Court, which requires such procedure.

Then appellant attempts to bolster its position by claiming that appellee *could not recover under the act in the event her own negligence was the sole cause of the accident.*

Appellant made no objection to the instructions given on this point and does not set out the part referred to, and if a request for such an instruction was made, no exception was made to the failure to give such an instruction or the grounds of objection urged at the trial set out, in accordance with the aforesaid Rules of this Court.

Moreover, we call the attention of this Court to Section 102-1713, O.C.L.A., which provides, among other things,

> " . . . In any action brought against such an employer on account of an injury sustained by his workman, it shall be no defense for such employer to show . . . *that the negligence of the injured workman, other than his wilful act, committed for the purpose of sustaining the injury, contributed to the accident.*" (Italics added)

Then the same *Fitzgerald* case, supra, also holds squarely in appellee's favor on this proposition, for the Oregon Supreme Court says, at 141 Or., Pages 14, 15:

> "Finally, it is urged that plaintiff's injury was caused solely by plaintiff's own negligence in failing to use the lantern provided for his use by the company, however, the jury would have been warranted in finding, and doubtless did find, that defendant was negligent in a way constituting the proximate cause of the accident; that plaintiff him-

> self was also negligent and that the combined negligence of the plaintiff and defendant caused the injury. *This is only another way of saying that defendant was contributorily negligent. Under the Employers' Liability Act, in cases between employer and employee contributory negligence may be taken into account by the jury in fixing the amount of the damage, but it is not a defense."* (Italics added)

In the case at bar appellant did not plead or ever contend at any time that appellee's negligence, *and her own wilful act,* committed for the purpose of sustaining the injury, contributed to the accident, as provided by Section 102-1713, O.C.L.A., supra.

Then the case of *Hollopeter v. Palm,* 134 Or. 546, 291 Pac. 380, 294 Pac. 1056, involving the Employers' Liability Act, is also square in point on this proposition, and the opinion, at Page 564, says:

> "The court charged the jury that the negligence of the plaintiff, *unless wilful,* was no defense; that the negligence of a fellow-workman of plaintiff on the building was not a defense; neither was assumption of risk available as a defense for defendant. These instructions were in accordance with the statute." (Italics added)

The court will also notice that the trial judge in the case at bar did instruct the jury upon the question of contributory negligence (T. 251, 252, 254 and 255). Section 102-1606, O.C.L.A., provides that the contributory negligence of the person injured shall not be a defense, but may be taken into account by the jury in fixing the amount of the damage.

ANSWERING APPELLANT'S SPECIFICATION OF ERROR NUMBER 5

as shown on Pages 32 to 35 of its opening brief herein.

Appellant complains that the trial judge did not instruct the jury properly as to the measure of damages in this case, and contends that plaintiff's condition and injury was not the result of the accident but was from a pre-existing condition.

The pre-trial order states that "Plaintiff contends that on May 15, 1943, when she jumped from the table top to the floor to begin work, she suffered a fractured bone and semilunar cartilage *and other damage thereto, the exact nature and extent of which is unknown to the plaintiff, of her right knee,* together with torn and wrenched ligaments of said knee . . . ." (T. 6, 7).

Nothing is said in the pre-trial order that appellant contended that appellee had a pre-existing injury, as it now urges in this brief.

Appellant is apparently complaining because the jury did not believe one or two of its witnesses (however, if the Appellant Court saw and heard these witnesses the reason for the disbelief would have been apparent) who testified appellee had some serious knee trouble before she was injured on May 15, 1943, and says there was no contention appellee sustained any injury to her knee at the time of the accident, on page 33 of its brief.

The Transcript of Record discloses on Pages 26, 27, 28, 29, and 33 that the records of the hospital at Bend, Oregon, show that appellee injured her knee May 15, 1943, on the job from jumping into a pit at the box factory of appellant.

Moreover, Mr. Veazie, of counsel for appellant, during the testimony of Dr. Woerner (T. 42 and 43), stipulated, with reference to the testimony, records and exhibits involved:

> "Is it agreed this statement regarding 'injury to the knee', 'jumped into the pit' and 'injury on the job', that those are statements by Mrs. Smith to the nurse or to the doctor? Will that be agreed to?"
> "Mr. Sims: I think that is right, your Honor. Yes."

Then Dr. Woerner testified appellee had a fracture of the semilunar cartilage and other knee trouble as the result of this jump into the pit (T. 44).

The X-rays also indicate injury to the right knee as Dr. Chuinard explains in his testimony (T. 81, 82, 83, and 84). Dr. Chuinard also testified this condition was one that was incident to accident or trauma (T. 85). Dr. Chuinard then goes on to testify that appellee told him she injured her right knee on May 15, 1943, when she jumped in the act of working, that she landed on her feet and at that time most of the weight seemed to be on her right leg, and she experienced sudden pain, severe pain in her right knee. The doctor further testified that "relying upon appellee's statement that she had no other injury or accident and on the history of continuous trouble since that time, and putting the

physical findings and the history and X-ray findings all together, it seems apparent that the patient has had a chronic disability in this knee resulting from the injury which she mentions . . . and that a surgical operation was required to remedy the injuries and that the knee would never be normal even after the operation . . . . and that there will be some permanent disability, no matter what is done" (T. 86, 87 and 89). Dr. Hosch also testified that he didn't think the knee would ever become perfect (T. 56).

Appellee herself testified that she changed to the job she was hurt on in May, 1943, and her foreman told her to jump down into the pit when she asked him how to get to her work position, and that when she complained about the jumping bothering her by feeling a drawing or gnawing sensation in her leg and wanting a different job, her foreman laughed at her and said, "Oh, that is just old age creeping up on you" (T. 185, 186 and 187). Appellee further testified that she had to work *fast,* that she jumped down to the floor of the pit, that she weighed 165 pounds then, and when she hit the floor she then got an awful lot of pain in her right knee; and that it hurt so bad she cried and her cutter called the foreman, and she told the foreman she had hurt herself, and he left her to get someone to take her place, and that Mr. Hufstader took her to the hospital (T. 188, 189, 190 and 191).

Appellee further testified that prior to May, 1943, her knees were all right and she never had any trouble with the knee and never complained of the knee before

the accident and that ever since the accident the knee aches and bothers her every day (T. 185, 198, 203 and 204).

Then we have the testimony of several of appellee's fellow workers who knew her for years or a long time, who testified as to her *state of good health* before this accident and injury *and that she did not have any knee trouble before May 15, 1943,* and how her right knee bothered her, etc., and she was crippled after the time she was hurt on that date (T. 60, 62, 66, 71, 72, 135, 174, and 175).

Dr. Hosch also testified he examined appellee before she went to work for appellant and that there was no evidence or history at that time of any lameness or difficulty of her knees prior to her going to work for appellant (T. 58).

Under the foregoing state of the record the evidence conclusively shows that appellee's injuries that she complains of were the result of the jump into the pit on May 15, 1943. Furthermore, appellant does not set out any requested instruction verbatim with grounds of objection at trial as required by Rule 20, sub. "D", of the Rules of this Court relative to this so-called alleged error, so the point is waived anyhow.

ANSWERING APPELLANT'S SPECIFICATION OF ERROR NUMBER 6

as shown on Pages 35 to 38, of its opening brief herein.

Under this alleged error appellant contends that the trial court erred in refusing to instruct the jury, as requested by appellant, that appellee could not recover for any injury or disability caused by traumatic arthritis, no claim having been made for such an ailment.

Appellant is a bit forgetful as to appellee's contentions as to the nature and extent of her injuries. On Page 36 of its brief this statement appears: "In her complaint (T. 6) the appellee claimed only that she sustained a torn and severed semi-lunar cartilage in her right knee and torn and wrenched ligaments that repeatedly became torn and wrenched whenever she tried to walk." No such language appears in Page 6 or in any other page of the Transcript of Record herein.

Turning back to Page 5 of its brief, appellant says:

> "Plaintiff contended that as a result of her descent from the table to the floor that she suffered a fractured bone and semilunar cartilage and other *damage thereto, the exact nature and extent of which is unknown to plaintiff, of her right knee,* together with torn and wrenched ligaments of said knee" (Tr. 6, 7). (Italics added)

The last paragraph was also taken from the pre-trial order, and does appear on Page 6 and 7 of the Transcript of Record herein.

We think that no further argument is needed on this proposition.

ANSWERING APPELLANT'S SPECIFICATIONS OF ERROR NUMBERED 7 and 8

as shown on pages 38 to 42, of its opening brief herein.

We believe that these so-called errors can be answered by the same facts and argument we used in answering Appellant's Specification of Error Number 5, and we refer the court to pages 18 to 21 this brief, and we also refer to the opinion of this court on the first appeal of this case.

CONCLUSION

In conclusion, we point out to the court that the law of this case was settled by this court in its opinion on the first appeal, as the evidence is substantially the same as before, and we have distinguished the Barker case, which is the only case recently decided by the Oregon Supreme Court that appellant absurdly contends controls this case. We respectfully urge the court that the verdict of the jury was just and correct, that appellant has had two fair trials, no prejudicial or reversible error appears in the record, and if there should be any error, it is harmless error, and that it appears that the within appeal delays the proceedings on and to collect the judgment of the lower court, and has been sued out merely for delay, and damages of 10% of the judgment herein in addition to the usual interest and regular judg-

ment should be awarded appellee herein, pursuant to subdivision 2 of Rule 26 of the Rules of this Court.

Respectfully submitted,

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